

greatplainsv.deptbanking2.13.15.txt

1

1 No: HHBCV15-6028096 S : SUPERIOR COURT
2 GREAT PLAINS LENDING, LLC, : JUDICIAL DISTRICT
3 Et al. OF NEW BRITAIN
4 v. : AT NEW BRITAIN, CONNECTICUT
5 STATE OF CONNECTICUT : February 4, 2015
6 DEPARTMENT OF BANKING, et al
7 _____:

8 B E F O R E: The Honorable Carl J. Schuman, Judge

9 A P P E A R A N C E S:

10 Representing the Plaintiffs:

11 Attorney Robert Rosette
12 Rosette, LLP
13 565 W. Chandler Boulevard
Suite 212
Chandler, AZ 85255

14 Also Present: Attorney Saba Bazzazieh and Attorney
15 Attorney Anthony Jannotta

16 Representing the Defendant:

17 Attorney Robert J. Deichert
18 Assistant Attorney General
19 P.O. Box 120
55 Elm Street
Hartford, CT 06141-0120

20 Also Present: Attorney John Langmaid, AAG

21

22 Recorded By:
23 Donna L. Peluso

24 Transcribed By:
25 Donna L. Peluso
26 Court Recording Monitor
20 Franklin Square
New Britain, CT
860-515-5380 Ext. 3080

27

greatplainsv.deptbanking2.13.15.txt

2

1 (In open court).

2 THE COURT: Good afternoon. Please be seated. This is
3 the matter of Great Plains Lending, LLC v. The State Banking
4 Department. Can I have the appearances of counsel,
5 beginning with plaintiffs' counsel.

6 ATTY. ROSETTE: My name is Robert Rosette, specially
7 appearing on a limited basis on behalf of Great Plains
8 Lending, LLC Clear Creek Lending, which are 100 percent
9 owned and operated by the Otoe-Missouria Tribe, and also
10 specially appearing on a limited basis on behalf of the
11 Tribe's Tribal Chairman, John Shotton.

12 THE COURT: All right. Are you the arguing counsel?

13 ATTY. ROSETTE: Yes.

14 THE COURT: Okay.

15 ATTY. ROSETTE: I should be handling potentially about
16 95 percent of the argument depending on what the questions
17 are.

18 THE COURT: True. All right. I'm not sure that we
19 recognize special or limited appearances in this state, but
20 we won't address that issue now. All right. Can we move
21 along. Go ahead, counsel.

22 ATTY. BAZZAZIEH: Saba Bazzazieh, Your Honor, on behalf
23 of plaintiffs.

24 THE COURT: All right.

25 ATTY. JANNOTTA: Anthony Jannotta, Your Honor, from the
26 Denton's law firm, on behalf of plaintiffs as well.

27 THE COURT: All right. For the commissioner?

greatplainsv.deptbanking2.13.15.txt

3

1 ATTY. DEICHERT: Assistant Attorney General Robert
2 Deichert.

3 THE COURT: Okay.

4 ATTY. LANGMAID: Assistant Attorney General John
5 Langmaid.

6 THE COURT: All right. Good afternoon, counsel. I've
7 read the papers, and I'm familiar with the case and the
8 issues.

9 Let me just address a few preliminary matters so we can
10 get to the heart of the matter. First, I'm inclined -- I am
11 prepared to consider the plaintiff's application for a
12 temporary injunction ex parte as a motion for stay.
13 Although, I would just advise the plaintiffs to become more
14 familiar with Connecticut procedure as we go forward, but
15 I'm not going to default plaintiff on that sort of technical
16 basis.

17 Similarly, I'm not going to consider the issues in the
18 defendant's motion to dismiss as relevant to the motion for
19 stay. We can address the motion to dismiss at the
20 appropriate time, but those issues are also somewhat
21 technical and I don't feel they rise to the level of being
22 relevant to the motion for stay. So we don't have to
23 address those today.

24 Third, I will tell you that I'm not going to order the
25 plaintiffs to pay into the Banking Department any monies by
26 February 6, so we don't have to address that sort of
27 time-sensitive issue, but I am interested in hearing from

greatplainsv.deptbanking2.13.15.txt

4

1 both sides either now or after court informally or by a
2 letter, or otherwise, what sort of insurances that the
3 plaintiffs could give and that the defendants would want to
4 assure that in the event that your appeals are unsuccessful
5 that you would be good to pay the, pay the order or pay any
6 judgment. So you can address those either now or later.
7 And just, for example, what I had in mind was either an
8 escrow account or bond or something along those lines.

9 ATTY. ROSETTE: Your Honor, and --

10 THE COURT: And you do have to stand when addressing
11 the Court.

12 ATTY. ROSETTE: I'm sorry.

13 THE COURT: Yes, sir?

14 ATTY. ROSETTE: Forgive me, Your Honor.

15 THE COURT: All right.

16 ATTY. ROSETTE: While, obviously, you've read our
17 briefs and --

18 THE COURT: I have.

19 ATTY. ROSETTE: -- and we're challenging this, the
20 jurisdiction of the Department of Banking, we, we believe
21 that paying those amounts in the form of escrow and a bond
22 would be acceptable.

23 THE COURT: I see. Okay. I don't know whether that
24 was something that you came close to agreeing upon with the
25 defendants, but perhaps you can either talk to defense
26 counsel after the hearing or, and see if you can agree on
27 the form for doing that. Or if you can't, then you can just

greatplainsv.deptbanking2.13.15.txt

5

1 submit a letter to me with your best proposal, and I could
2 hear from the defendants best proposal and decide. But it
3 sounds like you ought to be able to agree, or we ought to be
4 able to find a way that can protect both sides from the
5 financial consequences of losing.

6 So let's not belabor that issue, and we'll just really
7 focus on the cease and desist order and get to the merits,
8 which I have read a bit about. So, Mr. Rosette, on that?

9 ATTY. ROSETTE: Yes. Thank you, Your Honor. The
10 relief that we're seeking really has a, has a four-part
11 test, as you know, and if I could just address each of
12 those.

13 We really -- the tribe in this case, and it is the
14 Otoe-Missouria Tribe when, when bringing the action against
15 these two, two tribal business entities and the chairman,
16 has no adequate remedy at law. First of all, there is a
17 harm to the government that cannot be fixed by a, any sort
18 of monetary relief that, that we could seek. There is
19 direct harm to the tribe's sovereignty. The tribe in this
20 case would be unable to fund extremely important government
21 programs. These books are 100 percent taxed by the tribe.
22 Every penny of the revenues from these, these programs these
23 programs go to health-care dollars for elders, as you saw in
24 the affidavits, also language programs, other governmental
25 services by the tribe. This is a sovereign nation, and it
26 does have these government programs.

27 THE COURT: But isn't this essentially a commercial

greatplainsv.deptbanking2.13.15.txt

6

1 activity by the tribe that perhaps shouldn't get the same
2 sort of protection as attempt by a state government to
3 interfere with things that go more to the essence of tribal
4 self-government, such as schools or courts or, or government
5 institutions?

6 ATTY. ROSETTE: Well, these are, these are commercial
7 enterprises that are 100 percent owned by the tribal
8 government, and the attributes of sovereignty, this has been
9 held by the supreme court over and over again in Kiowa v.
10 Manufacturing Technologies, more recently in the Bay Mills
11 case, that the attributes of tribal sovereignty extend over
12 these tribal enterprises, specifically here these
13 enterprises have been structured and created in a manner in
14 which they are arms of the tribe. So they are, are provided
15 with all of those tribal attributes including sovereign
16 immunity from suit.

17 And, again, the way that they've been structured is not
18 only are the, the businesses owned 100 percent by the tribe,
19 they're managed by the tribe. And, most importantly, as I
20 stated, all of the revenues are directed to tribal
21 government programs. They are taxed 100 percent by the
22 tribe. That's essentially the only tax base that this tribe
23 has because of, of the rural location of the government and,
24 and their inability to seek various forms of economic
25 development. So it's not uncommon that tribes pursue these
26 types of interests through commercial ventures owned by the
27 tribe to provide for their citizenry as a sovereign nation.

greatplainsv.deptbanking2.13.15.txt

7

1 The other adequate, inadequate remedy at law that we
2 have is with regard to the chairman himself. The chairman
3 of the tribe is obligated to follow the law of the tribe, to
4 adhere to its constitution, and he would be unable to do so
5 in this instance, and, obviously, we don't have any, and
6 adequate remedy at law for that as well.

7 With regard to the second prong, whether or not the
8 tribe will suffer irreparable harm without an injunction
9 really allowing the department to proceed with enforcement
10 of an order results in an unprecedented finding that a state
11 administrative body can abrogate the sovereign immunity of
12 an indian tribe.

13 THE COURT: But why didn't you cite the second circuit
14 decision in Otoe-Missouria Tribe v. Financial Department of
15 New York in your brief?

16 ATTY. ROSETTE: Because, Your Honor, this is a classic
17 case of whether or not the tribe waived its sovereign
18 immunity from suit, and there's only two ways in which a
19 tribe can waive its sovereign immunity from suit. It can
20 consent to waive that immunity unequivocally and expressly
21 and grant a court, a state court jurisdiction or congress
22 can abrogate that immunity.

23 New York, the second circuit case is completely
24 distinguishable, and that case, the tribe, and it was this
25 tribe, which is no coincidence, brought that case. It was
26 an affirmative action and met that first prong. They
27 consented to that court's jurisdiction unequivocally and

greatplainsv.deptbanking2.13.15.txt

8

1 specifically and brought that affirmative action against the
2 state of New York. That is not want is occurring here at
3 all.

4 THE COURT: But you said this is an unprecedented state
5 action, but it appears the state of New York did the same
6 thing.

7 ATTY. ROSETTE: The, the state --

8 THE COURT: One counsel at a time, please.

9 ATTY. ROSETTE: The, the state of New York they -- my
10 understanding is they did not do the same thing. That the
11 state of New York has not taken any actions to find a
12 sovereign government. They haven't issued any fines to the
13 Otoe-Missouria Tribe, and they haven't attempted to enforce
14 any fines against the Otoe-Missouria Tribe. What the state
15 of New York was doing was impacting the tribe's ability to
16 engage in their lending operations by making very direct
17 threats to the banks that the Otoe-Missouria Tribe was
18 dealing with. And the Otoe-Missouria Tribe had
19 affirmatively brought action against the state of New York
20 in a New York court waiving -- obviously, because they're
21 bringing the action -- they are consenting to that court's
22 jurisdiction.

23 This action here would be unprecedented whereby a state
24 agency attempted to abrogate the sovereignty of the tribe
25 and abrogate the sovereign immunity of the tribe without
26 either of the very two clear principles that need to be
27 demonstrated. And, again, that's either consenting to that,

greatplainsv.deptbanking2.13.15.txt

9

1 to the jurisdiction of the state or pointing to
2 congressional abrogation of that sovereign immunity. And I
3 would add, Your Honor, that there is none of those arguments
4 posed in any of the papers filed by the state. They don't
5 make any of those points, they don't cite to any of those
6 cases, and, as I just pointed out to you, the second circuit
7 case in New York completely misses the mark with regard to
8 the issues that before you here today.

9 THE COURT: Well, I follow what you're saying. I think
10 that it's at least superficially close enough that it's
11 something that you should have cited. You're faulting the
12 defendants for not citing things, but this case is a similar
13 situation. I see the differences now, but I think it would
14 have been helpful to cite it rather than avoid it.

15 ATTY. ROSETTE: Your Honor, may my colleague make a
16 point?

17 THE COURT: Well, divided argument is --

18 ATTY. ROSETTE: Oh, okay.

19 THE COURT: -- not favored.

20 ATTY. ROSETTE: That, that's fine, Your Honor, but --

21 THE COURT: But we, we can move on.

22 ATTY. ROSETTE: There, there are -- there are cases
23 that, that this court can look to that we did cite, whereby
24 state governments have attempted to bring actions against
25 tribally owned enterprises. We cited those with regard to,
26 in California, the Miami Nation Enterprises case, whereby
27 the state of California attempted to bring an action, an

greatplainsv.deptbanking2.13.15.txt

10

1 enforcement action against --

2 THE MONITOR: Okay. Excuse me, Your Honor.

3 THE COURT: Right.

4 THE MONITOR: When your book laying on the button, it's
5 causes --

6 THE COURT: Oh.

7 ATTY. ROSETTE: Oh. I'm sorry.

8 THE COURT: Stay away from that. Right. Thanks.

9 ATTY. ROSETTE: And then also in Colorado we cite to
10 the Cash Advance and Preferred Cash Loans case, and in both
11 of those cases, the states attempted to bring exactly the,
12 the same facts that we have here and attempted to bring
13 actions against those arms of the tribe, even though they
14 were business enterprises. And in both of those cases, the,
15 the tribes sovereign immunity arguments have, have been
16 upheld consistent with the federal courts and supreme court
17 precedent that I have identified.

18 The state of New York case and the underlying basis for
19 it is just not applicable in this case because issues with
20 regard to whether or not the tribe waived its sovereign
21 immunity from suit were not at issue. And all those
22 underlying facts are irrelevant to the court issues, legal
23 issue as to whether or not the tribe has waived its
24 sovereign immunity from suit.

25 All of this argument, Your Honor, goes to the third
26 prong obviously with regard to our --

27 THE COURT: Likelihood --

greatplainsv.deptbanking2.13.15.txt

11

1 ATTY. ROSETTE: -- likelihood of success --

2 THE COURT: Sure.

3 ATTY. ROSETTE: -- in moving this, in moving this case
4 forward. The, the last --

5 THE COURT: Why didn't you appear at the hearing?

6 ATTY. ROSETTE: Well, Your Honor, we -- it's, it's
7 because we did file our -- we did make a special appearance.
8 We filed, what I believe very strong briefs with regard to
9 supreme court precedent, state court precedent, recognizing
10 the tribe's sovereign immunity from suit, and we felt that,
11 that we had put our best foot forward and expected the case
12 to be dismissed. And, and, you know, that's --

13 Going to the, the fourth prong of the test was, with
14 regard to the balance of equities tipping in the tribe's
15 favor. We just point out that the Connecticut law here in
16 this case does not apply, and the mere fact that Connecticut
17 has passed a statute restricting small-dollar lending does
18 not itself prove that there's a public interest served in
19 all cases if that statute can't be enforced or it's not
20 applicable to the Indian Tribe in this case. And we've
21 cited a couple of cases, obviously, Your Honor, for you to
22 consider with regard to those points.

23 Secondly, there is public interest in favor of the
24 tribe that is really un-quantifiable in many respects, but
25 nonetheless, there is significant public interest in
26 promoting self-government. You have a federally recognized
27 indian tribe here. It, it -- that tribe does predate the

greatplainsv.deptbanking2.13.15.txt

12

1 state of Connecticut, that predates the United States
2 Constitution and there is strong interest in insuring that
3 it has the ability to protect the welfare of its citizenry
4 and to operate as a government.

5 With regard to the issues here, the tribe has a
6 commitment to protecting consumers. They have best
7 practices in place. They have a regulatory agency in place
8 with a strong commitment to regulate these loans, to insure
9 federal compliance of all laws, of all federal laws to
10 insure compliance with all tribal laws. The citizens of the
11 state of Connecticut voluntarily, through electronic means,
12 seek these loans out from this government, agree to the
13 tribal court jurisdiction and agree to the provisions of
14 these loans.

15 THE COURT: Don't we have a situation which the harm to
16 individual consumers, at least as defined by state law,
17 which is flagrantly violated here, is very concentrated.
18 Whereas, the harm to tribal government seems to be rather
19 defuse in that, as far as I know, you can engage in this
20 business in all the other states, and just, at least, for
21 the period of this appeal, can't do it in Connecticut?
22 Doesn't that harm pale in comparison to the harm to a
23 consumer who has to repay a loan at up to 400 percent
24 interest?

25 ATTY. ROSETTE: Your Honor, to answer your question,
26 the, the -- the loan -- and I must tell you that the facts
27 of how these transactions occur are irrelevant with regard

greatplainsv.deptbanking2.13.15.txt

13

1 to the sovereign immunity argument. So I'd just like to
2 preface my comments with that. But these loans are
3 conducted and closed and the underwriting of the loans, et
4 cetera, occur on the tribe's reservation pursuant to the
5 tribe's laws. The customers of these loans understand the
6 terms of the loans. They voluntarily enter those loans.
7 They consent to the jurisdiction of the sovereign nation in
8 this, to this extent. And the bottom line is, is that the,
9 the loans themselves are compliant with all applicable law,
10 both tribal and federal with regard to consumer protection.

11 The tribe has taken every step as a sovereign
12 government to insure that those laws are followed and that
13 consumers are protected. You know, it's, it's almost no
14 different than a Connecticut resident that, that may take a
15 loan out in the state of Nevada while visiting Las Vegas in
16 contravention of Connecticut law in that case.

17 The third point that I wanted to make, though, is that
18 the department is not harmed in this case because by their,
19 their own admission, they can't do more itself to compel
20 plaintiffs' compliance with this order; so, therefore,
21 they're not necessarily harmed by having this stay in place
22 as well.

23 THE COURT: You mean that let's say there were no
24 administrative appeal. You're claiming that they, at least,
25 admit that they can't enforce the cease and desist order?

26 ATTY. ROSETTE: Correct. That's where the, obviously,
27 the attorney general's office would come in and --

greatplainsv.deptbanking2.13.15.txt

14

1 THE COURT: Well, they're in now --

2 ATTY. ROSETTE: -- at that point, we would have the --
3 it's kind of a fait accompli because then we have the
4 sovereign immunity arguments that obviously take precedent.

5 THE COURT: Uh-hum. It doesn't appear that, although
6 I'm not sure, but it doesn't appear that the customers or
7 consumers who are taking these loans out are necessarily the
8 most sophisticated in the world, and that's probably why we
9 have these sort of usury laws. And, although, I'm sure they
10 check, submitted or accept on their internet application,
11 it, it doesn't seem improper for the state to attempt to
12 protect these sort of consumers who may not understand that
13 they're consenting to tribal, to jurisdiction and all the
14 other things that you claim that they have knowingly and
15 voluntarily consented to.

16 ATTY. ROSETTE: Your Honor, there's, there's nothing --
17 very respectfully, there's nothing in the record that would
18 suggest that. In fact, there, there probably is strong
19 evidence that consumers who have the wherewithal to operate
20 a computer and engage in internet activity are, are -- are
21 sophisticated people. I'm sure that there is probably the
22 ability for the tribe at some point to demonstrate that the,
23 the customers to an online-lending facility are readily
24 distinguishable from those in brick-and-mortar type
25 facilities.

26 But all of that just right now are not facts that are
27 before Your Honor. What is before Your Honor is that, is

greatplainsv.deptbanking2.13.15.txt

15

1 that there is strong public interest for the tribe having
2 its legitimate form of government, funding its government
3 programs. The language programs for children. The old
4 ladies that, that may need the dialysis machine in a health
5 clinic, and the fact that this is a governmental operation.
6 This is a sovereign nation that is not violating any
7 applicable laws. As you read from our briefs, the state law
8 of Connecticut just does not apply not only to the tribe,
9 but not to these underlying loans.

10 And the Connecticut residents, what is in the facts, is
11 the Connecticut residents do consent to the jurisdiction of
12 the laws outside of the state of Connecticut where the loan
13 is being closed on the reservation.

14 THE COURT: Doesn't the sovereign immunity argument get
15 weaker when these transactions occur off reservation? They
16 incur in cyberspace somewhere.

17 ATTY. ROSETTE: Your Honor, they, they do not because
18 the supreme court has held in, in the Kiowa case that
19 sovereign immunity not only applies to tribally owned
20 enterprises, but tribally owned enterprises that operate off
21 of the reservation. And, again, if tribe's are not willing
22 to consent to waivers of that sovereign immunity from suit,
23 and, and if you read the Kiowa and the Bay Mills case, they
24 both focus on this point, then congress does have the
25 ability to abrogate that defense.

26 Congress, through its plenary power, can pass a law
27 that states that if tribes want to conduct business off of

greatplainsv.deptbanking2.13.15.txt

16

1 their reservation in other states, then they are waiving
2 their sovereign immunity from suit. That is not the case
3 here. It is not -- it's not the case. Period. The state
4 does not make that argument. And, again, the Supreme Court
5 of the United States has been very clear that sovereign
6 would apply to the facts of this case. Even though there's
7 an argument that it occurs in cyberspace.

8 THE COURT: All right. What else would you like to
9 add? I understand the basics of your argument. I'm going
10 to certainly give you a chance to respond after I've heard
11 from the defendants.

12 ATTY. ROSETTE: Your Honor, I would just like to add
13 that we, that we do meet all four tests for the stay, and I
14 would just leave you with that it is not the tribes goal to
15 break laws, operate irresponsible businesses. They have a
16 strong commitment to consumer protection. They have very
17 strong codes and they, they have a commitment to consumer
18 protection.

19 THE COURT: Well, what in this case show the tribe's
20 commitment to consumer protection?

21 ATTY. ROSETTE: Mostly, we've been able to provide you
22 the form of affidavits from the chairman, and in his
23 carrying out of the tribal law to insure that those
24 protections exist.

25 THE COURT: That's pretty vague. Anything more
26 specific?

27 ATTY. ROSETTE: Your Honor, we don't have anything more

greatplainsv.deptbanking2.13.15.txt

17

1 specific. But, again, the, the issue is whether or not the
2 tribe has waived its sovereign immunity from suit in this
3 case. So that's, that's all I have to say.

4 THE COURT: Sure. Thank you, sir. Mr. Deichert?

5 ATTY. DEICHERT: Thank you, Your Honor. We, obviously,
6 disagree that the plaintiffs have met the four-factor test.

7 The public interest, as Your Honor recognized, I think
8 weighs very heavily in favor of denying a stay in this case.
9 The people involved with these loans are generally -- and
10 we're prepared to put testimony on, if Your Honor would like
11 to hear it, about types of borrowers that have these loans.

12 As far as the tribe's consumer protection, I think it's
13 enough to say that certainly I don't think they dispute that
14 -- whatever consumer protection they have in place allows
15 them to do loans of up to 400 percent interest, and that
16 obviously is directly inconsistent with Connecticut's
17 consumer protection. And so these loans are uniquely
18 harmful in the sense that they tend to prey on lenders who
19 are, you know -- or borrowers who are unsophisticated, who
20 need money quickly, are willing to pay a very large interest
21 rate. And, again, we're willing to put on testimony on that
22 if Your Honor would like to hear it.

23 As to -- that also goes to the prong about interest of
24 the third parties. When you look at if the court were to
25 grant a stay in this case, that would allow Connecticut
26 consumers to presumably engage, you know, get loans during
27 the pendency of this appeal. Those loans could have terms

greatplainsv.deptbanking2.13.15.txt

18

1 that would go well outside, kind of the end of this
2 litigation. And even during this litigation, even in a
3 one-year period or even less, consumers can result -- can
4 get into significant trouble. If you look at the tribe's
5 website, for example, or the website for Great Plains
6 specifically, they have an example that they show a one
7 thousand dollar loan, basically the schedule requires that
8 the person taking that loan pay back over the -- and at the
9 end of the year pay back twenty-three hundred dollars in
10 interest on top of the one-thousand dollar loan.

11 So if you were to lift the stay in this case, that
12 would leave the tribe unfettered to get any number of
13 Connecticut consumers into that type of predicament.

14 THE COURT: Isn't that one that they might knowingly
15 and voluntarily get into?

16 ATTY. DEICHERT: That's -- You're correct, Your Honor.
17 I mean, and I guess, the judgment has been made by the
18 legislature that people should not be put in the position
19 where they're able to voluntarily agree to that because it's
20 illegal.

21 And now that gets to the point about applicable law.
22 My opposing counsel said that the second circuit's decision
23 in the Otoe case is irrelevant. I respectfully disagree. I
24 think it's highly relevant specifically to the issue of
25 applicable law. What the second circuit had there is a
26 situation very similar to what you have here in the sense
27 that there the tribe was seeking preliminary injunctive

greatplainsv.deptbanking2.13.15.txt

19

1 relief similar to a stay. And the second circuit -- the
2 district court denied the stay based on a lack of likelihood
3 of success on the merits. The second circuit affirmed that
4 decision and concluded that the tribes had not put on
5 sufficient factual evidence that the location of the
6 transaction was off reservation; and, therefore, under --
7 the district court properly denied the request.

8 Now, the second circuit offered the plaintiffs an
9 opportunity to develop facts on remand, and plaintiffs
10 chose, for whatever reason, to withdraw the case rather than
11 take that opportunity. So for whatever means, that means
12 that the second circuit indicated that there's a good
13 argument that applicable law here is Connecticut law.

14 THE COURT: I understood Mr. Rosette's argument to be
15 that in the New York matter, the state of New York went
16 after the third-party banks rather --

17 ATTY. DEICHERT: That's --

18 THE COURT: -- rather than the tribes.

19 ATTY. DEICHERT: That, that is correct, Your Honor. So
20 really the way I would conceptualize it is there's two
21 related issues. One is, is Connecticut law applicable to
22 these transactions? The second circuit looked at that
23 issue. Concluded that the tribe had failed to establish a
24 likelihood of success on the merits of that issue.

25 Now in the second circuit case, that's the only issue.
26 As Attorney Rosette said, they had -- they had voluntarily
27 invoked the jurisdiction of the district court --

greatplainsv.deptbanking2.13.15.txt

20

1 THE COURT: That's true.

2 ATTY. DEICHERT: -- in order to get a court ruling.
3 That raises the question here. They had voluntarily invoked
4 the jurisdiction of this court on this administrative
5 appeal.

6 Now they have certainly said throughout, and we admit,
7 they have said throughout that they are not -- they do not
8 intend to waive it. They've said that. I mean, and they
9 have done everything that's possible for them to say that
10 they're not intending to waive it. The question becomes
11 are, are those statements of intent enough to avoid a
12 litigation -- waiver by litigation conduct.

13 Now, Your Honor, in the -- in kind of a somewhat
14 analogous situation of a Eleventh Amendment immunity for a
15 state, the Supreme Court's decision in Lapidés talks about a
16 state waiving its Eleventh Amendment immunity by seeking a
17 federal forum, Specifically in the context of a removal in
18 that case. But it -- there is an argument to be made, and
19 we can certainly at the merits of this case address it as to
20 whether by bringing this appeal they've waived their
21 sovereign immunity.

22 Now that also gets to the question here, Your Honor,
23 none of the these entities are actually the tribe itself.
24 Now the plaintiffs have argued that they are arms of the
25 tribe, and they're correct that there are situations where
26 non-tribal -- non-governmental tribal entities can become
27 arms of the tribe.

greatplainsv.deptbanking2.13.15.txt

21

1 Now, Your Honor is probably familiar with
2 "arm-of-the-state" analysis for state sovereign immunity
3 purposes, and one of the factors for that analysis is
4 whether any financial recovery from the entity would go
5 against the tribe or the state in this "arm-of-the-state"
6 situation.

7 Now if I could point Your Honor to the plaintiffs'
8 papers, it's Exhibit C on page 29 of Exhibit C. This is a
9 citation -- this is tribal law on LLCs and specifically
10 tribally owned LLCs. If I could point Your Honor to page 29
11 of that exhibit, paragraph 1(b). That specifically provides
12 that any recovery against the Tribally owned LLC will not
13 inure against the tribe itself.

14 So if the plaintiff -- so that would go against that
15 aspect of the arm of the tribe analysis, and this is a
16 situation that -- at least in the "arm-of-the-state"
17 context, that -- the second circuit has concluded that that
18 is the most relevant factor is whether any financial
19 recovery would go against the state.

20 Now, again, the plaintiffs, I'm sure, will have
21 arguments for why that wouldn't control here, but that is
22 certainly -- really, at this stage, when we're trying to
23 determine whether there's grounds for litigation, and we
24 believe there is.

25 Now to get to -- in addition, in the tribal law, LLC
26 law it provides both that LLCs on page 14 of the same
27 exhibit I was referencing, that LLCs cannot engage in a

greatplainsv.deptbanking2.13.15.txt

22

1 violation of criminal law. Now a violation of Connecticut's
2 usury statute is a violation of Connecticut criminal law.
3 Now I'm sure that they'll have arguments that a violation of
4 Connecticut criminal law is not a violation of criminal law
5 for purposes of tribal law, but that's an issue that could,
6 that would need to be developed.

7 Now they -- they talk about the Supreme Court's case in
8 Kiowa, which is true, concluded that tribal sovereign
9 immunity can bar suit based on off-reservation conduct. Now
10 Kiowa did not involve a situation where the off-reservation
11 conduct was in cyberspace or where it occurred 1,400 miles
12 from the Tribe's reservation. Nor did it involve a claim
13 for injunctive or declaratory relief.

14 So the Department has two aspects of its order: It has
15 a cease and desist order, as case for declaratory injunctive
16 relief and it has monetary aspects. Kiowa did not say that
17 tribal sovereign immunity would bar a declaratory injunctive
18 plan, and that's analogous to the state sovereign immunity
19 situation where declaratory injunctive relief is more
20 available. And I can cite Your Honor to a case TTEA v.
21 Ysleta Del Sur Pueblo, which 181 f.3d 676. It's a fifth
22 circuit case from 1999 that discusses Kiowa specifically in
23 this aspect and cites supreme court authority for the
24 propositions.

25 THE COURT: With regard to financial order -- again,
26 it's not the main focus here. But, I think originally the
27 commissioner had ordered restitution that doesn't appear in

greatplainsv.deptbanking2.13.15.txt

23

1 the final order, is that now withdrawn?

2 ATTY. DEICHERT: I would say we are -- whatever the
3 commissioner ordered in the final order would be kind of the
4 applicable order.

5 THE COURT: Okay. All right.

6 ATTY. DEICHERT: And so --

7 THE COURT: And there does not appear to be a
8 restitution component to it. Just civil penalties and
9 injunctive relief.

10 ATTY. DEICHERT: Yep. That's my understanding. Oh, it
11 did. I'm sorry, Your Honor. If I may just confer?

12 THE COURT: Go ahead.

13 (Off record between counsel).

14 ATTY. DEICHERT: Okay. Your Honor, my client is
15 correcting my misstatement.

16 The restitution aspect did become operative by
17 operation of law because it appeared in the "whereas" clause
18 of the final order.

19 THE COURT: Oh.

20 ATTY. DEICHERT: So I apologize for misspeaking. Now
21 on the applicable law, again, to go back to the second
22 circuit's decision in Otoe, the court noted that the second
23 tribe was going, going to be able to avoid state regulation
24 on online lending, it would need to show very specific
25 facts.

26 Now we're dealing with an administrative appeal, where
27 they defaulted and declined to challenge the facts below.

greatplainsv.deptbanking2.13.15.txt

24

1 And so that goes to the likelihood of success as well.

2 THE COURT: Okay.

3 ATTY. DEICHERT: Now, and so I believe as to the issue
4 of reparable harm to the Tribe, Your Honor, I would agree
5 that the harm at issue here is -- I mean, ultimately, this
6 is balancing of the equities. To the extent the harm -- the
7 Tribe has harm and we're not in any way denying them their
8 sovereignty. Really the question is: what's the scope of
9 the sovereignty, and what's the more immediate harm? Is it
10 to the Connecticut citizens and residents who are being
11 charged these rates that, as you noted, flagrantly violate
12 Connecticut Law; or is it the general harm to the Tribe's
13 conception of sovereignty? And the question really is:
14 like, is there a limit to the Tribe's sovereignty? I mean
15 certainly the state's sovereignty has limits. Pretty much
16 any sovereign's sovereignty has limits. And really the
17 question before the Court is: what are the limits of that?

18 The question for the Court today is whether we want to,
19 while we're litigating those limits, do we want to leave
20 Connecticut consumers unprotected? And we respectfully
21 submit that the Court shouldn't. And I'm happy to present
22 evidence on the public interest, if you'd like.

23 THE COURT: Well, I don't think it's necessary, but I
24 think you said in your brief that the Tribe, even if it's
25 enjoined from -- excuse us.

26 (Interruption).

27 THE COURT: Even if the Tribe is enjoined from doing

greatplainsv.deptbanking2.13.15.txt

25

1 this in Connecticut is free to do it in 49 other states. Do
2 we know if that's the case? Do we know if they are, they do
3 practice in some states?

4 ATTY. DEICHERT: I actually do not know. I mean I
5 think it appears that they do, but they would be better able
6 to answer that question, Your Honor.

7 We have limited information about kind of the scope of
8 the Tribe's business in Connecticut. We did have these
9 complaints that brought this administrative action and we're
10 sure there is others; but we do not really have much of an
11 idea of how much business the Tribe does in the state of
12 Connecticut, which goes to whether they've met their burden
13 on showing a harm where we're not even -- it could just be
14 these three people. We don't really know.

15 THE COURT: What's the three people?

16 ATTY. DEICHERT: The three people that, that were
17 involved in the administrative -- that, whose loans were at
18 issue in the administrative hearing.

19 We would imagine that that's not the only customers
20 they have in Connecticut, but we, at this point I will
21 check, but I don't think we -- I don't believe that we have
22 other evidence at this point to, to go to the scope of
23 Tribal business in Connecticut.

24 THE COURT: Let me ask you this question which is a
25 slightly different topic, but on the issue of filing suit
26 against an indian tribe.

27 ATTY. DEICHERT: Yep.

greatplainsv.deptbanking2.13.15.txt

26

1 THE COURT: You claim that an administrative action is
2 not such a suit. Even if that's the case, how would you
3 enforce an administrative order without filing suit?

4 ATTY. DEICHERT: That's, that's a very good question,
5 Your Honor. I mean I -- my understanding is -- I mean it's
6 going to depend on the type of the kind of relief we were
7 looking at. I mean, ordinarily, in order for us to enforce
8 a money judgment, we would be required to, to go to court
9 and obtain a judgment, an actual court judgment allowing for
10 the award of money.

11 As to the injunctive relief, I would imagine probably
12 the same. Now that goes back to the question of what
13 consequence is it that we are now in court, and that's going
14 to be something that, you know, we're -- obviously, we know
15 that the plaintiffs have said that -- they were preserving
16 their sovereign immunity, you know, notwithstanding having
17 filed this action. And really the question, one of the
18 questions, one of the many questions in this case is going
19 to be: Can they do that?

20 You know, now a state -- to the extent the state is
21 analogous, state sovereign immunity is, in other states,
22 under Nevada v. Hall, is not required to be recognized.
23 States can choose to recognize it or not choose to recognize
24 it as a matter of comedy. But I mean, and tribal sovereign
25 immunity, I think a lot of issues with sovereign, you know,
26 are still being kind of worked out through the process,
27 through the courts.

greatplainsv.deptbanking2.13.15.txt

27

1 THE COURT: What sort of, given my statement, perhaps
2 even your position, that the plaintiffs are not going to be
3 required to pay anything to the defendants by February 6, is
4 there a likelihood of agreements with the plaintiffs as to
5 how they can insure payment of any judgment?

6 ATTY. DEICHERT: I believe that we would be more than
7 willing to, to discuss that with the plaintiffs and --

8 THE COURT: Okay.

9 ATTY. DEICHERT: -- then determine an acceptable means
10 of assuring that.

11 THE COURT: Okay.

12 ATTY. DEICHERT: And if I may just to the sovereign
13 immunity argument --

14 THE COURT: Yes, sir.

15 ATTY. DEICHERT: -- Your Honor, before I forget.

16 THE COURT: Yes.

17 ATTY. DEICHERT: There's two different types of claims
18 in this case. We have claims against the entities and we
19 have claims against the individual.

20 THE COURT: True.

21 ATTY. DEICHERT: Now the plaintiffs have focused a
22 great deal on the monetary claims against the individual.
23 We also have cease and desist declaratory injunctive claims
24 against the individual.

25 Now sovereign immunity just like, as with the state,
26 sovereign immunity generally not bar a declaratory
27 injunctive claim against an individual. And so that's

greatplainsv.deptbanking2.13.15.txt

28

1 another question that we would need to address. And so
2 really for today we're not asking the Court to resolve these
3 issues. There are many and complicated and difficult ones.
4 Really what we're asking is just allow us to protect
5 Connecticut consumers to the extent we can while we figure
6 these issues out and litigate them forward.

7 THE COURT: Is that part of the responsibility of the
8 Department of Banking: Protection of consumers?

9 ATTY. DEICHERT: Well, certainly the responsibility is
10 to enforce Connecticut's banking laws and those laws are
11 intended to protect consumers specifically against usurious
12 interest rates; and so, yes, I would say it is.

13 THE COURT: Okay. All right. What else would you like
14 to add?

15 ATTY. DEICHERT: I believe that's all, Your Honor.

16 THE COURT: Okay. Thank you, sir.

17 ATTY. DEICHERT: Thank you.

18 THE COURT: Your response, Mr. Rosette?

19 ATTY. ROSETTE: Thank you, Your Honor. With regard to
20 the New York case again, that entire case does not go to the
21 issues of sovereign immunity. And in this specific case,
22 our, our filings are not some sort of unwitting grant of
23 jurisdiction to this court. We filed only to contest
24 jurisdiction of this court. Oh, I'm sorry. To contest
25 jurisdiction of the Department and the decisions that they
26 made against the Tribe and no other purpose. It's a very --

27 THE COURT: Well, at the administrative level?

greatplainsv.deptbanking2.13.15.txt

29

1 ATTY. ROSETTE: At the administrative level.

2 THE COURT: Right. Right.

3 ATTY. ROSETTE: And --

4 THE COURT: But why isn't your filing of a suit here in
5 superior court a waiver of tribal sovereign immunity?

6 ATTY. ROSETTE: Because, Your Honor, we had a February
7 6th deadline that we needed to understand that there would
8 be a stay of, of any sort of attempt to, to collect on, on
9 an assessment that is not valid. And so we're seeking that
10 from this court, and obviously we will address the sovereign
11 immunity arguments, you know, as, as this case proceeds.

12 THE COURT: But, but it seems that you had a choice,
13 just like you say the consumer had a choice as to whether or
14 not to accept these loans. You had a choice, and you could
15 have decided not to file an action in superior court and
16 instead just let the Department of Banking orders stand
17 knowing that if they had filed an action in superior court
18 to attempt to enforce, then you would have a stronger
19 sovereign immunity argument. But instead you filed your own
20 suit in sovereign immunity, why shouldn't you be held to the
21 consequences of your own choice?

22 ATTY. ROSETTE: Your Honor, we, we cite to
23 well-established precedent in our brief that a sovereign
24 tribe's limited appearance in legal proceedings for the
25 purpose of seeking dismissal of an administrative action or
26 any sort of dismissal for lack of jurisdiction does not
27 waive any claims whatsoever to sovereign immunity.

greatplainsv.deptbanking2.13.15.txt

30

1 Kansas v. United States we cite, which is a tenth
2 circuit case. We've got, we've got several other cases in a
3 footnote that, that demonstrates the authority that, that --
4 this is our plaintiffs' application for a temporary
5 injunction to begin with. But we, we are not unwittingly
6 stepping into any issues except for what we have a very
7 clear understanding of what we can do.

8 With regard to the arm of the tribe analysis, Your
9 Honor, as you what might gather, state law and tribal law
10 are completely a different analysis with regard to this
11 issue. The arm of the tribe analysis has been litigated and
12 decided upon by several courts at the federal and state
13 level. It's very clear there is a specific test that we
14 laid out in our, in our pleadings to you in our application
15 for temporary injunctive. That test is whether or not the
16 entity was created by tribal law, whether the tribe owns and
17 controls the entity, the purpose of the tribal entity and
18 whether the entity's economic benefits the tribe, whether or
19 not their development arms are benefiting the tribe, and
20 whether or not the tribe intended for this entity to have
21 that arm of the tribe status. That test has been -- the
22 case has been litigated over and over again, and the law has
23 been very clear. Again, all on the basis of these tribal
24 sovereign-type precedent that has been set.

25 To the point that, regarding injunctive relief not
26 rising to the level of sort of the sovereign immunity-type
27 waivers.

greatplainsv.deptbanking2.13.15.txt

31

1 THE COURT: Right.

2 ATTY. ROSETTE: I just point out that in the Bay Mills
3 case, the state of Michigan sought injunctive relieve in
4 that case, and the sovereign immunity of the tribe was
5 upheld. So you can look to the supreme court's recent 2014
6 decision with regard to that.

7 And then with regard to whether or not, you know, this
8 rises -- the Department of Banking's action rises to the
9 level of a suit, the Banking Department obviously follows
10 the Connecticut code in this matter which identifies the
11 action they took as a contested case in the law itself.
12 There is a decision-maker, there is briefing. There's no
13 doubt that that was an adversarial action. And really
14 sovereign immunity from suit means that we're not, that the
15 Tribe is not subject to legal proceedings where those two
16 factors come into play, whether the Tribe consented to that
17 jurisdiction or whether congress abrogated it. And the
18 very, as you probably know, the very basis of sovereign
19 immunity which comes all the way from England, is that, you
20 know, that governments should not have their treasuries
21 depleted through various actions that come against them. So
22 it's a time old notion of the law.

23 The Colorado case, and we also cited to some Minnesota
24 administrative proceedings in our action, noted that those
25 state enforcement actions were equivalent to suit. So we
26 ask you to seek guidance particularly from the Colorado
27 Supreme Court case.

greatplainsv.deptbanking2.13.15.txt

32

1 One other point that I just make is, is they
2 demonstrated the only record in this case is that there
3 actually is no evidence that no more than three people have
4 alleged harm or that this exists, and we ask you to
5 recognize that the Tribe in this case, this is a government.
6 There is a real impact to their sovereignty, to the chairman
7 of this Tribe to follow his constitution, to carry out his
8 legal duties to his Nation, and there are government
9 programs that are at stake here with regard to the harm that
10 can be caused if the stay is not put into place.

11 THE COURT: Some of that I might be able to get from
12 the affidavit or affidavits that you've attached. But I
13 think some of the same issues are going to arise on the
14 merits as to whether this goes to the essentials of tribal
15 self-government as to whether you should be able to assert
16 sovereign immunity. But the record is not going to contain
17 that information because you didn't appear at the
18 administrative hearing.

19 So how, how are you going to prevail on the merits of
20 the administrative appeal and establishing sovereign
21 immunity when many of these facts are not in the record?

22 ATTY. ROSETTE: Because, Your Honor, in the, in the
23 Department of Banking proceedings, we did establish an
24 administrative record with regard to the Tribe's laws, the
25 formation of the companies and the regulations and so on and
26 so forth.

27 THE COURT: Well, was that part of your motion to

greatplainsv.deptbanking2.13.15.txt

33

1 dismiss?

2 ATTY. ROSETTE: Correct.

3 THE COURT: All right. Further comments?

4 ATTY. ROSETTE: No, Your Honor. Thank you.

5 THE COURT: All right. Let me just clarify that,
6 again, I'm not going to order the plaintiffs in any way to
7 make any payments to the state by February 6th or at any
8 point until the appeal is resolved. So would it be
9 sufficient if I just say in my order, which I will put in
10 writing, that the -- that the parties will work out the
11 remaining details. I'll say that, and if there are problems
12 then you can let us know. But from the responses, I'm
13 confident that the parties can agree on, on basically a
14 means of satisfying a judgment if there is a final judgment
15 against the plaintiffs, and then I'll address the injunctive
16 relief in my order.

17 I know you had some questions about scheduling. The
18 state has filed a motion to dismiss; ordinarily, you have 30
19 days to respond and then we usually set it down for a
20 hearing three weeks thereafter. If the date is
21 inconvenient, because I know you're coming from Washington
22 D.C., let us know and we'll find a convenient time.

23 ATTY. ROSETTE: Thank you.

24 THE COURT: And then we'll try to move along the
25 merits. It's probably -- well, as quickly as possible.
26 Okay? All right. Thank you very much. We'll stand
27 adjourned.

greatplainsv.deptbanking2.13.15.txt

34

1 No: HHBCV15-6028096 S : SUPERIOR COURT
2 GREAT PLAINS LENDING, LLC, : JUDICIAL DISTRICT
3 Et al. OF NEW BRITAIN
4 v. : AT NEW BRITAIN, CONNECTICUT
5 STATE OF CONNECTICUT : February 4, 2015
6 DEPARTMENT OF BANKING, et al
7 _____:

8 C E R T I F I C A T E

9 I hereby certify that the foregoing pages are a true and
10 correct transcription of the audio recording of the
11 above-referenced case, heard in Superior Court, Judicial
12 District of New Britain, New Britain, Connecticut, before the
13 Honorable Carl J. Schuman, Judge, on the 4th day of February,
14 2015.

15
16 Dated this 18th day of February, 2015, in New Britain,
17 Connecticut.

18
19
20
21
22 
23 _____
24 Donna L. Peluso,
25 Court Recording Monitor
26
27